Editor's note: Reconsideration granted; decision vacated -- See 96 IBLA 260 (March 26, 1987)

AMOCO PRODUCTION CO. ET AL.

IBLA 85-70 Decided June 30, 1986

Appeal from a decision of the Utah State Office, Bureau of Land Management, denying request for suspension of operations and production for oil and gas leases U-39578 through U-39585, U-50720 and U-50880.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Oil and Gas Leases: Suspension

   Where oil and gas leases issued after enactment of the Federal Land Policy and Management Act of 1976, are located within a wilderness study area, are subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability and are denied applications for permit to drill for failure to meet the nonimpairment standard, the denial itself is not a restriction which is tantamount to a suspension under 30 U.S.C. § 209 (1982).

APPEARANCES: Grand Neely, Attorney-in-Fact, Amoco Production Company; C. C. Parsons, Attorney-in-Fact, Southland Royalty Company; Bruce C. Bertram, Attorney-in-Fact, Hershey Oil Corporation, on its own behalf and on behalf of and as general partner of HOC 1982 Rockies Oil Program Limited Partnership; Patricia A. Nail, Pro se; David K. Grayson, Esq., Office of the Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Amoco Production Company, et al., 1/ appeal from a decision of the Utah State Office, Bureau of Land Management (BLM), dated July 31, 1984, denying their request for suspension of operations and production (SOP) for 10 oil and gas leases, U-39578, U-39579, U-39580, U-39581, U-39582, U-39583, U-39584, U-39585, all effective March 1, 1978, U-50720, effective July 1, 1982, and U-50880, effective June 1, 1982.

1/ The other parties appealing are Southland Royalty, Hershey Oil Corp., HOC 1982 Rockies Oil Program Limited Partnership, and Patricia A. Nail. Subsequent to the filing of the appeal Amoco Production Company became the successor-in-interest to the record title of Southland Royalty in leases in the subject area.

These leases, all issued after the effective date of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1982), and all located within the Mancos Mesa Wilderness Study Area (WSA), are subject to the Wilderness Protection Stipulation as set forth in the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP) of December 12, 1979. 2/ 44 FR 72014 (Dec. 12, 1979). Chapter III(J)(1)(b) of the IMP states that "[r]egardless of the conditions and terms under which these leases [post-FLPMA leases issued prior to the IMP] were issued, there are no grandfathered uses inherent in post-FLPMA leases. Activities on post-FLPMA leases will be subject to a special wilderness protection stipulation as stated in Appendix A" (IMP at 24, 44 FR 72029 (Dec. 12, 1979)). This stipulation states that "[a]ctivities will be permitted under the lease so long as BLM determines they will not impair wilderness suitability" (IMP at 27, 44 FR 72031 (Dec. 12, 1979)).

On August 18, 1983, BLM approved the Mancos Mesa Unit Agreement, San Juan County, Utah, which included the leases in issue. The agreement, designated No. 14-08-0001-21215, was, according to its terms, effective as of the date of approval. In its letter of approval, BLM specified that no extension of time beyond February 18, 1984, would be granted to commence the "obligation well," other than "unavoidable delay," where justified.

By applications filed September 8, 1983, and amendments filed September 21, 1983, Amoco Western Company, the unit operator, requested approval to drill on oil and gas leases U-39579, U-39582, and U-39584. The applications for permit to drill (APD's) were denied on December 15, 1983, for the reason that this activity would impair wilderness characteristics. No appeal from this denial was taken. However, by letter dated January 30, 1984, the unit operator, citing "unavoidable delay," requested an extension of time in which to commence drilling under the unit plan "until such time as the W.S.A. is either declared a Wilderness Area or is returned to Multiple Use Management." 3/ The requested indefinite extension was granted on February 15, 1984.

In a letter dated April 18, 1984, to the Director, BLM, appellants requested a SOP for their 10 oil and gas leases committed to the Mancos Mesa unit. In their request, appellants explained that their APD's were denied for failure to meet the nonimpairment criteria included in the leases, and because of such restrictions, they were obstructed from developing the leases due to circumstances beyond their control. In their letter appellants did not mention that an extension for commencement of the unit well had already been granted. Appellants referred to 43 CFR 3103.4-2 which provides that the authorized officer may direct a suspension of operations and production in the interest of conservation, and may grant an extension in lease term equivalent to the duration of the suspension period. Appellants requested that:

2/ The IMP was revised on Apr. 6, 1981 (46 FR 20607) and July 12, 1983 (48 FR 31854).
3/ Accompanying the request were copies of "Designation of Agent" from Amoco Western Company to Amoco Production Company for the wells in question.

1. The suspension be made effective January 1, 1984, and that the subject Federal Oil and Gas Leases continue in suspension until such time as the Operator's Agent, on behalf of Applicant, is able to acquire all necessary permits, authorizations and access to, and for the drilling of the initial obligation well as provided for in Section 9 of the Mancos Mesa Unit Agreement dated August 18, 1983;

> 2. The current lessees of said Federal Oil and Gas Leases be relieved of any and all obligations pertaining to payment of lease rentals with respect to said leases for each full lease month during which operations and production are in the state of suspension.

On July 31, 1984, BLM denied appellants' request for the SOP stating that "[w]here leases are subject to wilderness protection, and there has been no discovery and a lessee's requests for application for permit to drill have been denied, the Secretary's policy generally has been to not grant relief from the denial by granting a suspension."

In their statement of reasons, appellants assert that BLM's decision of December 15, 1983, denying the APD's effectively suspended operations within the Mancos Mesa unit and the leases included therein. They cite Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981), in support of this assertion. They further contend that the granting of the request for an extension of time to commence drilling was a tacit acknowledgment that operations within the Mancos Mesa unit had been suspended until the WSA is declared a wilderness area or is returned to multiple use management.

Appellants contend that the general policy of denying SOP's under the circumstances set forth in BLM's decision should not be applied here. This is so, appellants explain, "since the suspension which has been effected was certainly in the interest of conservation" and is clearly contemplated under section 39 of the Mineral Leasing Act, 30 U.S.C. § 209 (1982), and 43 CFR 3103.4-2. Further, appellants contend that the relief sought (i.e. suspension of annual rental payments and extension of the term of the leases by the period of the suspension) equitably preserves the rights of all parties until such time as the WSA is declared a wilderness area or is returned to multiple use management.

On January 13, 1986, the Board issued an order directing BLM to provide the Board with "a copy of the written Secretarial policy" that served as the basis for the BLM decision. On February 24, 1986, BLM responded stating that the basis for its decision was the IMP and the statement therein at Chapter III(1)(d) that

> [i]n instances where a lease is encumbered by a wilderness protection or no-surface occupancy stipulation and there has been no discovery and a lessee's request for application for permit to drill has been denied, the Secretary's policy generally has been and will be to not grant relief from the terms of the stipulation by granting a suspension.

(IMP at 25, 44 FR 72029 (Dec. 12, 1979)). BLM stated that the IMP itself is Secretarial policy, having been adopted as such when it was published in the Federal Register under the signature of the Deputy Assistant Secretary of the Interior on December 12, 1979. In addition, BLM submitted a copy of a Department of the Interior news release, dated December 12, 1979, quoting statements by then Secretary of the Interior Cecil D. Andrus concerning the IMP. BLM states the news release clearly indicates Secretary Andrus regarded the IMP as Secretarial policy. Finally, BLM asserts the IMP has not been the subject of a lawsuit, and it continues to be the duly promulgated policy of the Secretariat of the Department of the Interior.

Section 39 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 209 (1982), authorizes the Secretary of the Interior to suspend oil and gas leases in the interest of conservation. It states:

> In the event the Secretary of the Interior, in the interest of conservation, shall direct * * * the suspension of operations and production under any lease granted under the terms of this chapter, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto.

30 U.S.C. § 209 (1982); 43 CFR 3103.4-2.

Section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1982), specifically directs BLM to carry out a wilderness review of the public lands and section 603(c), 43 U.S.C. § 1782(c) (1982), instructs BLM to manage the lands under review "in a manner so as not to impair the suitability of such areas for preservation as wilderness." Section 603(c) provides a special exemption from the nonimpairment mandate for mining, grazing, and mineral leasing uses existing as of October 21, 1976. Section 701(h) of FLPMA, 90 Stat. 2786, recognizes valid existing rights.

The IMP explains that these mandates in FLPMA establish as a matter of law that, while some development activities are permissible on lands under wilderness review, they are subject to important limitations and must be carefully regulated. All activities except those specifically exempt must be regulated to prevent impairment of wilderness suitability. If a nonexempt activity cannot meet this condition, the activity cannot be permitted on lands under wilderness review. The general standard for interim management is that lands under wilderness review must be managed so as not to impair their suitability for preservation as wilderness. This is known as the "nonimpairment" standard (IMP at 6-7, 44 FR 72015 (Dec. 12, 1979)). Since the leases in question were issued after the effective date of FLPMA, the activity on these leases must meet the nonimpairment standard.

The IMP specifies that before approving proposed activities generally identified as nonimpairing in the IMP, BLM will first ensure that they conform to the existing management framework plan or resource management plan, if one exists. BLM will then review the proposal through an environmental

assessment (EA) to determine whether, in a specific case, the activities will be nonimpairing and to ensure that approval of such activities will not create a situation in which the cumulative effect of existing uses and the new proposed uses would impair wilderness suitability (IMP at 10, 44 FR 72018 (Dec. 12, 1979)). BLM properly reviewed appellants' APD's in the EA, dated December 12, 1983, and concluded that the applications should be denied. Based on the determination in the EA, appellants' APD's were denied for failure to meet the nonimpairment standard. Appellants' subsequent request for the SOP was denied on the basis of the policy set forth in the IMP not to grant relief from the terms of the wilderness protection stipulation by granting a suspension.

[1] We turn first to appellants' contention that under the reasoning in Copper Valley Machine Works, Inc. v. Andrus, supra, they are entitled to a suspension. Copper Valley involved the imposition of a "winter season only" restriction in an APD on an oil and gas lease. The lease itself did not include such a restriction. The restriction was placed in the APD because of the fragile nature of the tundra. The court found the restriction constituted a suspension of operations and production within the meaning of 30 U.S.C. § 209 (1982), and that Copper Valley was entitled to an automatic lease extension equal to the period of suspension.

The critical distinction between Copper Valley and the present case revolves around section 603 of FLPMA, 43 U.S.C. § 1782 (1982). The leases in this case are post-FLPMA leases impressed with the wilderness protection stipulation prohibiting activities which would impair the suitability of the lands for inclusion in a wilderness area. This affirmative limitation was imposed by Congress in section 603 of FLPMA and is separate from suspensions, as authorized by the Mineral Leasing Act, 30 U.S.C. § 209 (1982).

In Rocky Mountain Oil & Gas Ass'n v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), Judge Kerr rejected the Department's attempts to impress post-FLPMA leases with the wilderness protection stipulation. He stated, "such a system of issuing 'shell' leases with no development rights is clearly an unconstitutional taking and is blatantly unfair to lessees." Id. at 1345. Judge Kerr perceived as inequitable the imposition of a restriction that would allow the Government to continue to collect rental at the same time it might never authorize beneficial use of the leases. The Tenth Circuit Court of Appeals in its decision Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (1982), reversing Judge Kerr, expressly cited his reasoning on this point (696 F.2d at 740) and rejected it.

In Copper Valley the question was whether the Secretary had, in essence, suspended a lease by limiting drilling thereon to a specified period of time to protect the tundra. The court ruled the Secretary has done so and that such action was in the interest of conservation under the suspension provision of the Mineral Leasing Act, 30 U.S.C. § 209 (1982). The court held the Secretary's failure to suspend the running of the lease term at the same time he effectively suspended beneficial use of the lease was not justified under the Mineral Leasing Act.

In its Rocky Mountain Oil and Gas Ass'n (RMOGA) decision the Tenth Circuit Court of Appeals relied on the clear congressional intent underpinning section 603 of FLPMA to find Congress directed the Secretary to take such steps as were necessary to prevent impairment of lands suitable for wilderness designation until such time as Congress could determine what course of action it should take. Thus, the issue in cases involving the imposition of the nonimpairment standard is not whether by the application of such standard the Secretary has effectively suspended a lease pursuant to 30 U.S.C. § 209 (1982), but the authority of the Secretary to issue leases in which ultimate beneficial use may never occur. The Tenth Circuit stated in RMOGA that Congress had given the Secretary that authority and that such limitations on beneficial use did not constitute a compensable taking.

Imposition of the wilderness protection stipulation on the leases in question and denial of the APD's was nota restriction tantamount to a suspension under 30 U.S.C. § 209 (1982), but was, in fact, an implementation of the will of Congress, as expressed in section 603 of FLPMA, that the Secretary should protect such lands. 4/

We do not mean to imply that the Secretary may not suspend leases such as those involved in this case; however, the circumstances of this case are not, under the reasoning of Copper Valley, equivalent to a suspension under 30 U.S.C. § 209 (1982). Appellants have presented no evidence that the facts are such that a suspension would be appropriate herein. Section 603 of FLPMA was in existence when appellants obtained their leases. They must be considered to have known of the possibility that beneficial use of the leases might be restricted or denied. Lessees took that risk when they filed their offers and accepted the lease terms.

Since we have concluded appellants are not entitled to suspensions of their leases, we need not address BLM's contention that the IMP represents Secretarial policy and, therefore, is binding on the Board and controlling in this case. 5/

4/ In Texaco, Inc., 68 I.D. 195 (1961), an oil and gas lessee had been denied a drilling permit in order to protect potash deposits. The Department held, however, that the refusal to permit drilling on the leases amounted to an order prohibiting operations; that the order was in the interest of conservation; and that suspension under 30 U.S.C. § 209 (1982), was appropriate. The same rationale set forth above is applicable to distinguish the Texaco case from the present case.

5/ We note, however, that BLM's contention that the IMP, as published in the Federal Register in 1979 and signed by the Deputy Assistant Secretary, represents Secretarial policy is undercut by the fact that IMP was subsequently amended on at least two occasions by officials of BLM. See 46 FR 20607 (Apr. 6, 1981) (signed by the Acting Director, BLM); 48 FR 31854 (July 12, 1983) (signed by the Director, BLM).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bruce R. Harris
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

James L. Burski
Administrative Judge